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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES INCORPORATED, *Petitioners*,

v.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Respondents submit that the question posed by Conditional Cross-Petitioners (hereinafter "petitioners", or "CBS and the other plaintiffs") should more properly be phrased as follows:

Whether the reception by respondents' CATV systems of television signals (broadcast by the station with the copyright owner's authorization for public

reception) and the distribution of those broadcast signals to subscribers should be converted into a "performance" of the program "in public" within the meaning of §§ 1(c) and 1(d) of the Copyright Act, *because*

(i) on separate channels not used for broadcast reception the CATV makes available to subscribers programs it has originated (which in one situation included commercial announcements), or

(ii) in two instances two or more of respondents' CATV systems simultaneously distributed a sports program to their subscribers on such other separate "nonbroadcast" channel,

where program origination by the CATV was in compliance with regulations for CATV issued by the Federal Communications Commission, and such an extension of the Copyright Act would be in conflict with one of the key elements of the F.C.C.'s regulatory scheme for CATV?

STATEMENT

A. SCOPE OF THE CONDITIONAL CROSS-PETITION

Respondents to this Conditional Cross-Petition [1] have filed a Petition for a Writ of Certiorari No. 72-1628, which challenges the holding of the Court of Appeals in this case, reversing the District Court, that the operation of Teleprompter's community antenna television (CATV) systems in receiving and distributing broadcast signals to subscribers constituted a "performance" of the broadcast program "in public", and therefore an infringement under the Copyright Act, *to*

[1] Hereinafter cited as "Pet." The Joint Appendix in the court below is cited as "JA" and the Joint Exhibit volume as "JE".

the extent that the signals received were so-called "distant" signals. Respondents' Petition in No. 72-1628 sets out in the Statement, pp. 5-19, a description of the background of the case and facts in this case pertinent to the "distant signals" issue posed by that Petition. Respondents will not discuss issues pertinent to the "distant signals" question in this Brief in Opposition except to the extent petitioners' arguments in this Conditional Cross-Petition have melded these issues.

The Conditional Cross-Petition by CBS and the other plaintiffs challenges the following holdings by both courts below:

> (1) "[W]e hold that the fact that certain of the CATV systems involved here originated programming and [sic] nonbroadcast channels did not make them 'performers,' for copyright purposes, of broadcast programming distributed to subscribers." (Pet. App. A, 14a-15a; see also Pet. App. B, 23b-24b).
>
> (2) "With regard to the sale of commercial time on nonbroadcast programming, although this is another step bringing cable origination programming in competition to some extent with broadcast programming, again, we do not agree with appellants' position that there is some sort of 'spillover' effect by which the system becomes a 'performer' with regard to its reception service." (Pet. App. A, 15a; see also Pet. App. B, 17b).
>
> (3) "There was no interconnection here relating to the reception of any telecast of appellants' copyrighted programs, or indeed of any broadcast programming, received by the system and distributed to subscribers. * * * In light of the minimal inter-

connection we have before us, we must agree with the district court that '[w]hatever this brief interconnection may portend for the future, it [did] not transform [Teleprompter's] present CATV system into a broadcasting network as [appellants] suggest.' " (Pet. App. A, 15a-16a; App. B, 16b).

B. THE FACTS PERTINENT TO HOLDINGS CHALLENGED BY THE CONDITIONAL CROSS- PETITION

(1) General

Most of the facts pertinent to the questions posed by the Conditional Cross-Petition were stipulated. Petitioners own copyrights in television programs, which were broadcast by television stations pursuant to authorization of CBS and the other plaintiffs. Respondents' CATV systems in five communities—Farmington, N.M.; Elmira, N.Y.; Rawlins, Wyo.; Great Falls, Mont.; and New York City, N.Y.—are specifically named [2] in the complaint and two supplemental complaints. They received the signals broadcast by the television stations at the pertinent times [3] off-the-air on antennas and distributed *all* signals received from

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[2] Petitioners assert that it "was agreed" that the five named CATV systems "were to be used as 'illustrative' examples" (Pet. p. 6 n. **). Respondents at no point agreed to this argument by CBS and the other plaintiffs. The proof adduced at trial was limited to the five CATV systems named in the complaints.

[3] The complaints allege infringement of programs broadcast and received by the CATVs in November, 1964 (Farmington and Elmira CATVs), in June 1969 (Farmington, Rawlins, Great Falls and New York City CATVs) and in March 1971 (Farmington and New York City CATVs). Whether the specified CATVs "performed" the copyrighted programs named in the complaint must of necessity depend on the facts as to the activities of the particular CATV at the pertinent date, see *infra*, pp. 13, 17-19.

these stations unedited (including station identifications and all broadcast commercials), by cable, and in some cases by microwave and cable, to subscribers' homes for their viewing on their own television sets. In addition to receiving and distributing to subscribers signals broadcast by television stations, respondents' CATVs involved in this case engaged in operations on other channels (so-called "nonbroadcast channels") not involving any of petitioners' copyrighted programs, which are the subject of the Conditional Cross-Petition, and which petitioners assert converted the reception service into a "performance" of the broadcast programs, and therefore an infringement.

(2) Program Origination on Nonbroadcast Channels

A coaxial cable, such as that used in respondents' CATV systems, may be used for transmitting signals of many different frequencies simultaneously.[4] It is this "great potential of cable technology" of making many channels available which the F.C.C. recognized in its regulatory scheme for CATV when in 1969 it issued a rule requiring that CATV systems with more than 3,500 subscribers originate their own programming on at least one channel.[5] At each of the pertinent

[4] CATV amplifying equipment has and does technologically limit the number of channels which can be distributed to subscribers. At times pertinent to the alleged infringements, respondents' amplifying equipment could distribute five channels (Farmington, 1964), and in the other situations or later with respect to Farmington, twelve channels, to subscribers. Although none was installed at any time pertinent to the alleged infringements, modern CATV amplifying equipment is capable of distributing 20 or more channels.

[5] *First Report and Order on Community Antenna Television Systems*, 20 F.C.C. 2d 201, 202 (1969), hereinafter cited as *"First Report and Order"*. This rule—47 C.F.R. § 74.1111—was originally

times, respondents' CATVs involved in this case had greater channel capacity than the number of television stations being received and carried on the system. It is on these channels not being used for broadcast reception that the CATV originations challenged by petitioners here were distributed to subscribers.

In some situations "local origination" by the CATV consisted only of an automatic time and weather service, with or without background music (e.g., Elmira in November, 1964,[6] and Rawlins in June, 1969[7]); to provide this service the CATV had a small untended television camera which automatically scanned a board with time, temperature and other weather dials. The other three CATV systems involved in the case, in addition to automatic origination services, originated so-called "entertainment" programs of various types —motion pictures, and/or short films (see JA 197n.); live interviews with local personages, public-interest matters, and local sports[8]—on a nonbroadcast channel,

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scheduled to be effective January 1, 1971, but this effective date was extended until April 1, 1971, and then suspended pending review proceedings which culminated in this Court's decision upholding the F.C.C.'s regulations. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The F.C.C. has not yet acted to make its CATV-originations rule effective, although its recent *Cable Television Report and Order*, 36 F.C.C. 2d 141 (1972) has reaffirmed the importance of CATV origination in its regulatory scheme for CATV.

[6] JA 214. The Elmira CATV also distributed to subscribers on this same nonbroadcast channel signals embodying educational programs produced and originated by the local school system. JA 215-216.

[7] JA 241, 546-48.

[8] This programming and the equipment used by the CATV in this local origination is described in detail in the stipulations. JA 193-202, 229-33, 254-57, 271-75, 281-90.

for a few hours a day in the case of two systems,[9] and about 40 hours a week in 1969 and 70 hours a week in 1971 in the case of the New York City CATV.[10]

None of petitioners' programs were involved in the CATV originations. The signals embodying these CATV-originated programs were distributed by the CATV to its subscribers through the cable system, *although always on separate channels not used to receive broadcasts.* It was stipulated that respondents secured appropriate permissions and copyright licenses when necessary for their CATV-originated programs. JA 164.

Respondents started CATV origination in Farmington in 1964 as a promotional device to attract subscribers to the CATV's reception service. Through such origination the CATV could offer a different variety of programs on a channel not used for broadcast reception. JA 523-24, 560-66.

No separate or per-program charge was made by the respondents' CATV systems for these local originations. The CATVs charged a flat monthly fee, and in some cases an installation charge, for connection to the system, and did not change their charges to subscribers when they commenced or expanded such originations. CATV origination made up only a very small proportion of the total of broadcast signals and

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[9] *Farmington:* 1964, for 4½ hours, a day seven days a week (JA 193); 1969, for 3 hours a day, five days a week (*Ibid.*); 1971, for 4 hours a day, five days a week (JA 271). *Great Falls:* 1969, 2 hours a day, five days a week (JA 229).

[10] JA 254, 281.

local origination available to the CATV's subscribers. The origination equipment was not used in the reception service, and the origination, *which was always on separate channels not then being used for broadcast reception,* in no way interfered with or interrupted the reception and distribution of broadcast signals.

(3) Sale of Commercials on Nonbroadcast Channels

The only evidence of a sale of advertising by respondent in this case consists of a contract entered into by the New York City CATV for commercials in connection with sports events at Madison Square Garden which were distributed in 1971 by that CATV on a nonbroadcast channel, JA 284-87; JE 179-81, 235-41. The contract provided for two 60 second beer commercials per event for each of approximately 60 1971 events.[11] Importantly, as the District Court and the Court of Appeals both noted (Pet. App. A, 10a, 15a; App. B, 17b), these commercials were sold and carried on nonbroadcast channels as part of CATV originated programming and had nothing to do with commercials on broadcast programs which were received and made available to subscribers.

Petitioners fail to mention that the F.C.C. specifically authorized CATV systems to sell commercials on nonbroadcast channels when it (in 1969) adopted its rule requiring local origination by CATV systems with more than 3,500 subscribers.[12] Since the Commission recognized that the required program origination would be an expensive burden on CATV opera-

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[11] The income from these commercials was much less than the amount paid by the New York City CATV for the right to distribute the events to subscribers. See JA 285-286.

[12] *First Report and Order, supra,* n. 5, ¶ 38, at 218.

tors, advertising was allowed because "it would permit CATV to derive additional revenue to help defray the costs of origination." [13]

(4) So-Called "Interconnection"

The only evidence in the record of instances of "interconnection" between respondents' CATV systems involved in this case relates to the two heavyweight championship fights, in February, 1964 and May, 1965. Respondents purchased the closed-circuit rights to make these events available to subscribers. Through telephone-company circuits the fights were carried to the CATVs where they were distributed by cable on a nonbroadcast channel to subscribers who chose to view them on their own sets (JA 258-59).

Respondents paid for the right to distribute these programs, but no separate charge was made to subscribers for this service. The record shows that respondents used these events as a promotional device to solicit subscribers (JA 259, 526, 567; JE 230-31).

There was also evidence in the record that, pursuant to the requirements of its New York City CATV franchise (JE 402; JA 280-81), that CATV system had the standby capability to connect with two other CATV systems (not owned by respondents) in New York City, and this capability had been used on occasion (JA 280-81). But this standby "interconnection" capability had nothing to do with reception of broadcasts of petitioners' programs.[14]

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[13] *Ibid.*

[14] Petitioners refer to respondents' "plans" for the future in connection with possible use of an earth satellite to make programs available to CATVs for distribution on nonbroadcast chan-

C. OPINIONS BELOW

Both the District Court and the Court of Appeals rejected petitioners' contentions that the CATV's origination activities on nonbroadcast channels in some manner "tainted" the CATV's reception service, and converted the CATV's reception and distribution of broadcast signals into a "performance" of the broadcast programs.

The precise holdings of the Court of Appeals on these contentions are quoted *supra*, pp. 3-4. It reasoned that "[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations . . . ." (Pet. App. A, 13a), commenting that petitioners' "approach would be unnecessarily wooden and mechanical in its application of copyright law to CATV" (*Id.* 15a).[15] The Court of Appeals similarly rejected petitioners' contention for "some sort of 'spillover' effect" (*Ibid.*) by reason of the sale of commercials to be carried with the CATV-originated programs.

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nels (Pet. p. 15 n. **, at 16). Any such plan requires F.C.C. approval, and such possible future activity (when and if allowed) provides no factual support for an argument that the activities of respondents' CATVs were a "performance" of petitioners' programs in 1964, 1969 or 1971.

[15] The District Court concluded that:

> "But the nature of and function of a CATV with respect to received shows is not changed by the presence of original material on other channels or at other times. What Teleprompter is doing to plaintiffs' copyrighted material, and other over-the-air broadcasts, is the same whether the CATV's originate programs or not. The 'function' of the reception service is not changed by simultaneous sale of original shows, just as it would not be changed by Teleprompter's simultaneous delivery of free ice cream or candy to every subscriber." Pet. App. B, 24b.

With respect to so-called "interconnection", the Court of Appeals noted that the only interconnection on the facts in the case involved nonbroadcast channels and that "[t]here was no interconnection here relating to the reception of any telecast of appellants' copyrighted programs, or indeed of any broadcast programming, received by the system and distributed to subscribers." (Pet. App. A, 15a).

ARGUMENT

I. THE COURTS BELOW CORRECTLY HELD THAT THE RESPONDENTS' CATVs BROADCAST-RECEPTION-FUNCTIONS WERE SEPARABLE FROM THEIR PROGRAM-ORIGINATION FUNCTIONS, AND ACCORDINGLY THAT SUCH CATV ORIGINATION ACTIVITIES DID NOT CONVERT THE RECEPTION AND DISTRIBUTION OF BROADCAST SIGNALS ON SEPARATE CHANNELS INTO A PERFORMANCE.

This Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), establishes the rule that reception and distribution of broadcast signals to subscribers for viewing on their own sets does not constitute a "performance" of the broadcast programs within the meaning of sections 1(c) and (d) of the Copyright Act. The Court's analysis was based on its "determination of the function that CATV plays in the total process of television broadcasting and reception" (392 U.S. at 397), in which "broadcasters perform" and "viewers do not perform." *Id.* at 398. The Court concluded that CATV fell "on the viewer's side of the line". *Id.* at 399. The CATV system provided "a well-located antenna with an efficient connection to the viewer's television set" (*Ibid.*), the "basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer" (*Ibid.*), and "the function of CATV has little in common with the function of broadcasters." (*Id.* at 400).

In two footnotes (392 U.S. 392 n. 6, 399 n. 25) the Court made it clear that it was deciding the case before it on the basis of the facts with respect to the two Fortnightly CATVs involved.[16] This normal reservation by the Court became necessary because of the extensive references and arguments by the respondent copyright owner and its *amici* supporters in their briefs as to what the Fortnightly CATVs were capable of doing,[17] or what other CATVs were allegedly doing or might allegedly be capable of doing in the future.[18] But the underlying principle of the Court's *Fortnightly* holding—that "CATV operators, like viewers and unlike broadcasters, do not perform the [broadcast] programs that they receive and carry" (392 U.S. at 400-01)—necessarily serves as the basis for analysis of whether respondents' CATV systems involved in this case "performed" petitioners' broadcast programs when they received the broadcast signals and carried them to subscribers.

Petitioners' argument for "tainting" respondents' CATV's reception and distribution of broadcast signals with the CATV program-origination activities on

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[16] Petitioners quote from Fortnightly counsel's statement in its brief urging that the particular facts govern. (Pet. p. 11).

[17] The District Court in *Fortnightly* had found that the Fortnightly systems had the capability of program origination, and on one occasion had originated a slide message when there was an interruption in service. *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 197 (S.D.N.Y. 1966).

[18] *E.g.*, Brief for Broadcast Music, Inc. as Amicus Curiae, *Fortnightly Corp.* v. *United Artists Television, Inc.*, Supreme Court, No. 618 (1967 Term), which was submitted by the same counsel as have represented petitioner CBS throughout this case: Program origination by many CATV systems, "accompanied in some cases by advertising" (pp. 15-16); interconnection through possible future use of space satellites by CATV (p. 19).

separate channels, and thereby converting the unrelated reception and distribution of broadcast signals into a "performance", is based on the alleged "functional equivalence" of the CATV system, *viewed as a totality,* to a broadcaster (Pet. pp. 14-15). The District Court and the Court of Appeals found no change in function by the CATV on the ground of "totality". Moreover, in making this contention, petitioners confusingly paint with a broad brush and attempt to gloss over differences between the facts applicable to each of the five different CATV systems involved in this case, arguing, contrary to the record, that there is "totality" with respect to the facts applicable to all of these five systems (Pet. pp. 15-16).[19] The facts as stipulated, however, show that each of the five CATV systems had differences from the others in its activities and services provided to subscribers at the various times pertinent to the alleged infringements. There was only one single common denominator in these systems; each

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[19] *E.g.*, (1) the New York City CATV received and carried only New York City television stations, pursuant to the requirements of its franchise (JE 390, 404), and therefore never "chose to import [programs] from hundreds of miles away" (Pet. p. 15). (2) The "multipoint microwave system" referred to (Pet. p. 15) was used in system operation only by the New York City CATV, and there *not* to "reach every home in any area within a radius of some twenty miles" (*Ibid.*), but instead only to serve in lieu of a cable connection between that CATV's principal antenna site and two subsidiary sites. JA 252-53, 280-81. (3) There was no evidence in the record (see *supra*, p. 8) that any of the five CATV systems other than that in New York City "sold advertising time to sponsors" (Pet. p. 15). (4) At times pertinent to the alleged infringements, the only "programming" originated by the Rawlins and Elmira CATVs was the automatic time and weather service provided on the separate channel not used for broadcast reception. JA 214-15, 241, 527, 546-48.

There are a number of other such deficiencies in petitioners' "totality" picture.

performed a reception-service function for its subscribers; broadcast signals were received off-the-air on receiving antennas and carried by cable, or microwave and cable (depending on the particular CATV system and/or the particular signal in question), to subscribers for viewing on the subscribers' sets. This reception-service function was in all cases the overwhelming and primary operation and business of the respondents' CATV systems.[20] The CATVs' automatic and program origination services provided an ancillary and promotional service to attract subscribers to the reception service.[21] But more importantly, and as the courts below both recognized, program-origination activities by respondents' CATVs were always on separate channels, and constituted a separate and independent function of the CATV. Petitioners seek to make much of the fact that subscribers paid for all services as a "package". Respondents' income flowed from monthly subscription fees paid by members of the public for connection to the CATV system. Reference to a "package" merely means that there was never any separate charge for origination or other services. The courts below found that this did not change the CATV's reception function on broadcast channels in any way.

Petitioners' argument (Pet. pp. 13, 15) based on "selection" and "procurement" of programs by

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[20] Petitioners footnote suggestion to the contrary (Pet. p. 6 n. **), conspicuously without record citations, is unsupported in the record, or the opinions below. The reception of broadcast signals by any standard—hours available, subscriber interest, source of income—greatly outweighed in importance and volume the origination service. See note 21, *infra*.

[21] JA 523-24, 533, 542-43, 549, 550, 560-62, 566, 574-78.

broadcasters adds little to logical analysis. Of course, respondents' CATVs "selected" and "procured" those programs the CATVs originated and distributed on nonbroadcast channels. With respect to broadcasts received, respondents had no control over programs and did not select or procure programs any more than the Fortnightly CATVs did.[22] In any case the issue on this Petition is whether CATV origination changed the CATV reception service.

This Court's reasoning in *Fortnightly* does not suggest any basis for a conclusion that CATV program-origination services on separate channels change the CATV's reception-service function. The service provided by a CATV to a subscriber is clearly discrete as to each separate channel of broadcast reception, or CATV origination on nonbroadcast channels, and the broadcast-reception function is equally discrete and separable from the origination function. To carry out the function of receiving broadcast signals for its subscribers, the CATV "provides a well-located antenna with an efficient connection to the viewer's television set" (392 U.S. at 399) to receive a station's broadcast signals for the subscribers viewing. Origination by the CATV of its own programs and their distribution to subscribers in no way interferes with the broadcast reception. The CATV is concededly a performer of

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[22] When petitioners argue that the CATVs "selected" and "procured" programs, like a broadcaster, *by reason of the CATV making a decision to receive and carry a particular station* (Pet. p. 15), they are attempting to resurrect an argument put to rest by *Fortnightly*. The fortnightly CATVs had made similar decisions as to which stations they would receive and carry among those available for reception, as the District Court in *Fortnightly* found (255 F. Supp. at 188), but this Court plainly concluded that such a decision *as to the particular station to be received* did not constitute "selection" and "procuring" programs like a broadcaster.

programs it originates, but that is not petitioners' argument here.[23]

Both courts below rejected the "totality" argument and found that the CATV's reception function was separable from the origination function, and that programs and automatic origination services provided by the CATV on separate origination channels were irrelevant to the CATV's activities in receiving and distributing broadcast signals. Aside from the formless "totality" theory, petitioners have never suggested any explanation as to why the same reception-service function provided by the Fortnightly CATVs should be converted into a "performance" because of CATV origination on separate channels.[24] Would the CATV reception service continue to be changed into a "performance" during times when there was no origination (non-automatic origination was either only a few hours a day or several hours a day)? And the opinion testimony of the alleged "numerous witnesses" offered

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[23] None of the programs of CBS and the other plaintiffs were involved in any of respondents' CATV origination, and it was stipulated that respondents secured the necessary authorizations or copyright licenses for such CATV originations. JA 164.

[24] Although providing no help to their legal argument, petitioners suggest their real concern with CATV origination when they argue that "program origination in substantial amounts by Teleprompter has the inevitable effect of diluting the broadcaster's audience and thus further reducing the income of copyright owners." Pet. p. 12. Of course, this overlooks the benefit provided to the copyright owner through having the CATVs available as a market for programs CATVs originate. But the essential point is that CBS' desire, as a broadcaster and network, to eliminate competition for audiences stands revealed. CBS wishes to freeze "the present system of nationwide program distribution by the television networks through their affiliated stations" (see JE 470) so that it can maximize its profits, in disregard of the public interest in "choice of programs and types of services". See discussion infra, pp. 19-21.

by petitioners at trial as to respondents' CATVs being "functionally equivalent to broadcasters" (Pet. p. 17)[25] is nothing more than a conclusory assertion echoing petitioners' unsupported legal argument of "totality".

II. THE COURTS BELOW BOTH CORRECTLY HELD THAT PETITIONERS' "SALE-OF-COMMERCIALS" AND "INTERCONNECTION" CONTENTIONS ADDED NOTHING TO PETITIONERS' BASIC ORIGINATIONS ARGUMENT.

The courts below both concluded that the sale of commercials by the New York City CATV in connection with its originations on nonbroadcast channels did not convert the CATV's reception and distribution of broadcast signals into a "performance" of the broadcast programs for essentially the same reasons that the program origination itself on nonbroadcast channels did not effect such a conversion. (Pet. App. A, 13a-15a; App. B, 17b.) And the courts below reached the same conclusion for the same reasons with respect to "interconnection" (Pet. App. A, 15a-16a; App. B, 16b), although comment was also made that there was only "minimal interconnection" before them. (*Ibid.*)

Petitioners apparently recognize the paucity of the evidence in the record[26] as to respondents' sale of com-

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[25] Petitioners fail to mention that one of these witnesses (Gray), on whose testimony they here rely, conceded on cross-examination that the Rawlins CATV at the time of the alleged infringement was "about the same" as the CATV he had formerly owned in Utica, N.Y. (JA 388)—both provided an automatic time and weather service, and both used microwave to "import" so-called "distant" signals—and that he "didn't regard" his Utica CATV "as a broadcast station" (JA 387). Petitioners also fail to mention the concession by a CBS Vice President witness (Blank) on cross-examination that it was "debatable" whether automatic origination services (such as time and weather) should be considered program origination in this context (JA 459-60).

[26] See discussion in Statement on these points, *supra*, pp. 8-9.

mercials associated with CATV-originated programming, and as to so-called "interconnection" by respondents' CATVs, but they attack the decisions of the courts below on these points with misleading explanations,[27] talk of future "plans", and the apparent argument that the failure by the courts below to issue an advisory opinion on such minimal evidence "merely invites further litigation". Pet. pp. 8-9, 15 n. ***, 16 n. *. Apparently, petitioners contend that any sale of commercials to be carried with the CATV-originated programs, no matter how small in amount, is such a significant fact that the "totality" of the New York City CATV (and perhaps all of respondents' other CATVs as well) should thereby be deemed converted to the "functional equivalent of a broadcaster." Similarly, petitioners' contention as to interconnection would use the "relatively few examples of interconnection in the record" (Pet. p. 16),[28] together with "Teleprompter's capability and plans" (*Ibid.*), as the basis for such a conversion of respondents' CATVs to the functional equivalent of a broadcaster, whether or not they were

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[27] For example, petitioners imply that respondents stopped the sale of commercials by its CATVs "during the pendency of the case" (Pet. p. 16). The record is clear that respondents had never sold such commercials, pursuant to corporate policy, until after the F.C.C. decision in 1969 authorizing this (see p. 8, *supra*), and that after such decision, respondents' management reconsidered this matter, and authorized such commercials in connection with originated programs on its CATVs in order to help pay for origination costs, JA 576-78, 605-08.

[28] To be more precise, only two such samples—two heavyweight championship fights in February 1964 and May 1965, distributed by the Farmington, Elmira and Great Falls CATVs to subscribers on their nonbroadcast channels, and the New York City CATV's required capability to connect with other CATVs in the city. See discussion in Statement, *supra*, p. 9.

involved in the "interconnection" and whether or not the "interconnection" took place at (or even near) the time of the alleged infringement.

Petitioners' reference to respondents' future capabilities and plans as a crutch to replace the deficiencies in evidence supporting its theories on sale of commercials and "interconnection" is akin to arguments made by the copyright owner and its *amici* supporters in *Fortnightly* (see discussion, *supra*, p. 12), and should receive the same treatment as in *Fortnightly*. Any decision that respondents infringed petitioners' copyrights on the specific dates in 1964, 1969 and 1971 must necessarily depend on the facts with respect to the operations of respondents' CATVs involved in this case at times pertinent to the alleged infringement. If these facts are such that petitioners' issues are not properly posed, the remedy is certainly not an advisory opinion in order to settle possible future litigation.

III. PETITIONERS' CONTENTION THAT CATV ORIGINATION CONVERTS THE RECEPTION AND DISTRIBUTION OF BROADCAST SIGNALS INTO A PERFORMANCE IS IN DIRECT CONFLICT WITH THE F.C.C.'s REGULATORY PLAN FOR CATV.

Although the Petition is conspicuously silent with respect to the communications-law aspect of CATV origination, both courts below noted that the F.C.C. has adopted rules which, although suspended pending judicial review and not yet made binding on CATV, would require CATV systems with more than 3,500 subscribers to have their own program origination on at least one nonbroadcast channel. Pet. App. A, 15a, n. 13; App. B, 23b. See discussion *supra*, p. 5. This CATV-origination requirement was based upon

and recognized CATV's "great potential . . . to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ." *First Report and Order, supra,* n. 5, ¶ 3, at 202.

The Commission has recently expanded its CATV origination requirement to include not only the specific designation of at least one channel for non-automatic "origination cablecasting", but also a requirement to provide additional nonbroadcast channels for public access, educational access and leased access. *Cable Television Report and Order, supra,* ¶¶ 121-25, at 190-92; 47 C.F.R. §§ 76.201, 251. The CATV "nonbroadcast channel" requirement was imposed by the F.C.C. as a condition of the CATV's right to receive and carry broadcast signals in its interrelated regulatory scheme. *Ibid.* The sale of commercials in connection with "origination cablecasting" is specifically permitted by the regulations, although significantly restricted when compared to what commercials a broadcaster can carry. See 47 C.F.R. § 76.217.

A large number of CATV systems throughout the United States, including respondents' (see JE 158-59, 161-62), moved forward voluntarily to comply with the F.C.C.'s 1969 regulation requiring the provision of nonbroadcast channels, even though the Commission did say that it would permit waivers to systems having difficulty complying, and then subsequently suspended the effective date pending judicial review.[29] This

[29] See *United States* v. *Midwest Video Corp., supra,* n. 5, at 654 n. 7, for a history of the Commission's rulings on the effective date of this regulation.

Court has upheld the F.C.C.'s authority to issue this cablecasting regulation, as well as the regulation itself as "plainly supported by substantial evidence that it will promote the public interest." *United States* v. *Midwest Video Corp., supra,* n. 5, at 673.

Now petitioners would have these CATV systems penalized, by proposing a new copyright rule converting reception and distribution of broadcast signals into a "performance" of broadcast programs and consequent copyright infringement, because the CATVs were doing what the Commission wanted them to do in the public interest—*i.e.,* cable origination on non-broadcast channels. The CATV "origination cablecasting" *in compliance with these F.C.C. regulations* would, according to petitioners' contentions, so taint the CATV as a "totality" that its entire operations become "functionally equivalent to a broadcaster" (see Pet. pp. 14-17).[30]

We submit that this proposed construction of the statute conflicts with the principles which have been approved by this Court (see *Farmers Union* v. *WDAY,* 360 U.S. 525 (1959)), and would lead to an unconscionable result. If upheld, petitioners contentions would also frustrate a key part of the Commission's regulatory scheme for CATV which the Commission has found to be in the public interest. The courts below

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[30] Petitioners' contentions must reach this ultimate position. Infringement is claimed with respect to the New York City CATV, which received and carried *only* local—i.e., New York City—television stations. See *supra,* n. 19. Thus, despite petitioners' confusing rhetoric (Pet. pp. 15-16), petitioners' determinant effecting such a conversion must be CATV program origination standing alone, without any "importation" of distant signals involved,

correctly reached the proper resolution that the reception-service and program-origination operations of respondents' CATVs involved in this case were separate functions, as recognized by the F.C.C. in its regulations, and thus correctly avoided a direct conflict between the Copyright Act and the F.C.C. regulations under the Communications Act.

CONCLUSION

For the reasons discussed above, the courts below were clearly correct on the question posed by the Conditional Cross-Petition. Petitioners' contention would deny television reception to a large segment of the public relying on CATV, in view of the many CATV systems throughout the country originating their own programs on nonbroadcast channels in compliance with the F.C.C. CATV regulations.

Respondents believe that consideration by the Court of the important "distant signals" question posed by their Petition No. 72-1628 does not require consideration of the CATV-originations question posed by the Conditional Cross-Petition. The "distant signals" issue, as reflected by the differing decisions of the Court of Appeals and District Court on this point, turns on the facts with respect to reception and distribution of broadcast signals by the CATV systems involved, and, as respondents have pointed out in Petition No. 72-1628, raises a plain question of conflict with this Court's *Fortnightly* decision.

Since the courts below were correct in their holdings on the CATV-originations issue and since this issue is separable from the "distant signals" issue raised by Respondents' Petition in No. 72-1628, respondents sub-

mit that the Conditional Cross-Petition should be denied.

Respectfully submitted,

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